

The Honorable Ronald B. Leighton
Magistrate Judge Theresa L. Fricke

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

R.M., Individually,

Plaintiff,

V.

STATE OF WASHINGTON, et al.,

Defendants.

NO. 18-cv-05387-RBL-TLF

DEFENDANTS' OBJECTIONS TO
REPORT AND RECOMMENDATION
DKT 102

Noted for June 7, 2019

Defendants respectfully submit the following objections to the Magistrate Judge's Report and Recommendation to Deny Defendants' Summary Judgment Motion Concerning Qualified Immunity, issued on May 23, 2019. Under both §636 (b)(1)(C) and LCR 72, this Court must make a *de novo* determination of those portions of the report to which an objection has been made. Defendants submit these objections to the Report and Recommendation to preserve matters for this Court's review as well as for subsequent review.

I. SUMMARY OF DEFENDANTS' OBJECTIONS

1. The Magistrate Judge's recommendation to deny Defendant's summary judgment motion based on qualified immunity with prejudice should be rejected as unwarranted and unreasonable at this stage of litigation;
2. Given the Magistrate Judge's extensive factual recitation in addressing Defendants' summary judgment motion, the Court's order must clarify that it has not resolved any disputed factual issues;

1 3. The Magistrate Judge erroneously relied on *Hayes v. Snyder*, 546 F.3d 516 (7th Cir.
 2 2008), which is not factually analogous, and the Court should reject it as a basis to
 3 deny Defendants' summary judgment motion based on qualified immunity;
 4 4. The Magistrate Judge's Report and Recommendations erroneously concluded that
 5 the Seventh Circuit Court of Appeals decision in *Hayes* is the controlling law in this
 6 case, contrary to Supreme Court and Ninth Circuit rulings.

7 II. OBJECTIONS AND AUTHORITIES FOR OBJECTIONS

8 A. Any Denial of Defendants' Motion Should Be Without Prejudice and Must Not 9 Resolve Any Disputed Factual Issues

10 As a preliminary matter, the Report and Recommendation to Deny Defendants'
 11 Summary Judgment Motion Concerning Qualified Immunity ("R&R") invites the Court to deny
 12 the defendants' Motion for dismissal based on qualified immunity *with prejudice*, and to "hold
 13 that for purposes of qualified immunity analysis, the defendants conduct in evaluation and
 14 treatment of plaintiff concerning his Peyronie's disease violated a clearly establish right." *See*
 15 Dkt 102 (hereafter "R&R") at 31:21-23. For the reasons discussed herein, Defendants¹
 16 disagree that their Motion should be denied on qualified immunity grounds, and respectfully
 17 request that the Court grant the defendants' Motion for Summary judgment on the basis that
 18 defendants are entitled to qualified immunity.

19 Importantly, however, even if the Court denies Defendants' summary judgment motion
 20 on qualified immunity grounds, that denial should be *without prejudice*. As the Court correctly
 21 noted in the R&R, a qualified immunity analysis requires the Court to consider a certain amount
 22 of factual granularity. *See* R&R at 22:12-14. Such an analysis of facts is necessary because the
 23 legal issue underlying a qualified immunity analysis – whether the state of the law at the time of
 24 the incident provided "fair warning" to defendants that their alleged conduct was

25 ¹ In footnote 2 of the R&R, the Magistrate Judge identified all of the defendants as current employees of
 26 the State of Washington. Two of the defendants - Sheri Malakhova, MD, and Dale Robertson, PA-C - were
 independent contractors for the State of Washington at the time of the events at issue in this case, and not employees.
 Some of the other defendants were at the time but are no longer State of Washington employees.

1 unconstitutional - depends necessarily on the nature of the “incident” and the nature of the
 2 “conduct.” In denying summary judgment motion at an early stage of litigation, the Court
 3 necessarily must consider these issues based on a universe of facts that have not been fully
 4 developed by virtue of the discovery process.²

5 In concluding that genuine issues of material fact exist that preclude summary judgment
 6 on qualified immunity in the present case, the R&R references several allegations of the plaintiff
 7 asserted in his own pleadings and self-serving declarations. For example, in concluding that
 8 qualified immunity does not apply, the R&R cites to Plaintiff’s own declaration in stating
 9 that “Plaintiff repeatedly reported the painful symptoms of the disease as well as the deformity,
 10 plaques and nodules, and at various points complained of urinary issues from July 2014 to early
 11 2015, when he was transferred to a different prison.” *See* R&R at 25:20-22. However, the
 12 Defendants strongly deny the nature and extent of Plaintiff’s purported complaints, many of
 13 which are not supported by corroborating evidence. Defendants have not yet had the opportunity
 14 to take the deposition of the Plaintiff or conduct other discovery with respect to these
 15 issues. The providers to whom Plaintiff allegedly reported these symptoms have not yet
 16 testified. It is notable that, in many of the qualified immunity cases referenced by the Court,
 17 the Court makes reference to facts and testimony developed in discovery in determining whether
 18 dismissal based on qualified immunity grounds is appropriate. *See, e.g., Hayes v. Snyder*, 546
 19 F.3d 516 (7th Cir. 2008). Defendants respectfully request that the parties should be permitted to
 20 revisit this issue on a dispositive motion following the close of discovery. If, based on the facts
 21 known at that time, the Court concludes (for instance) that no reasonable fact-finder could find
 22 that a reasonable officer would know that their conduct was unlawful under the circumstances,

24 ² Defendants note that they dispute numerous facts alleged by the plaintiff and adopted by the Court
 25 in the analysis contained in the R&R. Given the obligation of the Court to review the facts in the light most
 26 favorable to the non-moving party on a summary judgment motion, defendants do not engage in a point-by-
 point rebuttal of facts for the purpose of the present Objections. Defendants specifically reserve the right to
 challenge any factual allegations pursuant to future motion practice, and at the time of trial.

1 then summary judgment would be appropriate. *See Bonivert v. City of Clarkson*, 883 F.3d 865,
 2 871-72 (9th Cir. 2018).

3 Moreover, even if the Defendants' motion for dismissal on qualified immunity is denied
 4 by the Court at this stage, it is important to recognize that all disputed issues of fact remain open
 5 questions at the time of trial. Any denial of the Motion must not purport to resolve any factual
 6 issues. As the R&R correctly points out, on a motion for summary judgment the Court is not
 7 permitted to weigh evidence or decide credibility. See R&R at 21:1-2, citing *Anderson v. Liberty*
 8 *Lobby, Inc.*, 477 U.S. 242, 255 (1986). The weight of evidence is a jury question, and the factual
 9 determinations made by the jury are relevant not only to the merits of the §1983 claim, but to
 10 the issue of whether qualified immunity itself applies. See *Morales v. Fry*, 873 F.3d 817, 822-
 11 23 (9th Cir. 2017) (observing that if a qualified immunity case goes to trial because genuinely
 12 disputed issues of material fact remain, then the qualified immunity from suit is transformed into
 13 a defense). While the Court appropriately views the facts in the light most favorable to the non-
 14 moving party at the time of summary judgment, the jury's ultimate factual determinations may
 15 or may not ultimately support a qualified immunity defense.

16 Accordingly, even if in the present case the Defendants' motion for summary judgment
 17 on qualified immunity is denied on the basis of existing issues of material fact, Defendants
 18 respectfully request that the Court decline to follow R&R's recommendation to "hold that for
 19 purposes of qualified immunity analysis, the defendants' conduct in evaluation and treatment of
 20 plaintiff concerning his Peyronie's disease violated a clearly established constitutional
 21 right." *See* R&R at 31:21-23. Issues relevant to determining the first prong of plaintiff's
 22 assertion that qualified immunity does not apply – including the nature of the conduct,
 23 evaluation, and treatment, the underlying considerations governing that conduct, and the actual
 24 complaints made by the plaintiff and what the defendants knew – all represent disputed issues
 25 of fact to be decided by a jury. *Morales*, 873 F.3d at 824 (referring to special interrogatories to
 26 the jury in the context of a qualified immunity defense). Based on the jury's factual findings on

1 these issues, the defendants must be permitted to argue that no clearly established law put the
 2 defendants on notice that their conduct was unlawful or violated a clearly established right, for
 3 the purpose of qualified immunity analysis. *See Morales*, 873 F.3d at 823-27 (“[w]hen there are
 4 disputed factual issues that are necessary to a qualified immunity decision, these issues must first
 5 be determined by the jury before the court can rule on qualified immunity. The issue can be
 6 raised in a [Federal Rule of Civil Procedure] Rule 50(a) motion at the close of evidence.”) (citing
 7 to Ninth Circuit Model Civil Jury Instruction 9.37 (2017)).

8 Based on the above, Defendants respectfully request that, should Defendants’ motion for
 9 summary judgment on qualified immunity be denied, it be denied *without prejudice*, and without
 10 resolving or purporting to resolve any factual issues relevant to either the qualified immunity
 11 defense, or the Plaintiff’s underlying §1983 or medical negligence claims.

12 **B. *Hayes v. Snyder* is Not Analogous and Therefore Not Controlling as a Basis to Deny
 13 Defendants’ Summary Judgment Motion Based on Qualified Immunity**

14 In the R&R, the Court opines that “The closest case law existing at the time of
 15 events...that should have put the defendants on notice -- for purposes of qualified immunity --
 16 is from the United States Court of Appeals for the Seventh Circuit”.... *Hayes v. Snyder*, 546
 17 F.3d 516 (7th Cir. 2008). *See* R&R at 23:13-15. The Court utilizes this case to conclude that
 18 “although there are no cases with precisely the same facts, there is substantial analogous
 19 authority such that the state of the law at the time of the incidents in question provided fair
 20 warning to the defendants that their alleged conduct was unconstitutional.” *Id.* at 23:7-
 21 8. However, the Court’s reliance on Hayes is misplaced because it is not analogous and should
 22 not be a basis to deny defendants’ summary judgment on qualified immunity.

23 In *Hayes*, the inmate was seen by Dr. Hamby along with other medical providers and
 24 was noted to complain of cysts and growths on his testicles causing muscle cramps compressing
 25 his testicles and excruciating pain. *See Hayes*, 546 F.3d at 518. He also could not urinate
 26 without extraordinary measures. *Id.* During its analysis, the *Hayes* court held that “A claim of

1 deliberate indifference to a serious medical need contains both an objective and subjective
 2 component.” *Id.* at 522. The court did not hold, nor has Plaintiff argued, that a denial of a
 3 referral to a medical expert is always a violation of constitutional rights.

4 For the objective component, the *Hayes* court relied on *Gutierrez v. Peters*, 111 F.3d
 5 1364, 1373 (7th Cir. 1997), and determined that the objective component was met if a serious
 6 medical need existed where the condition featured “chronic and substantial pain.” *Hayes*, 546
 7 F.3d at 523. Taking the facts most favorable to Plaintiff here, he “began experiencing
 8 intermittent dull throbbing pain during the day” and “sometimes there would be some pain at the
 9 tip of his penis.” *See R&R* at 3:14-16. He also had pain with nightly erections. *Id.* at 3:18-
 10 19. However, he had no issues with urination. *Id.* at 7:20-21. A few months later, Plaintiff
 11 described his condition as “painful with erection.... and unable to masturbate.” *Id.* at 8:3-
 12 5. During the entire course of treatment, even if taken in the light most favorable to Plaintiff,
 13 the most pain plaintiff complained of was “severe pain with nocturnal erections.” *Id.* at 8:21-
 14 22; 9:1; 9:11; 10:23; and 11:14. In addition, by 2017, Plaintiff again denied any interference
 15 with urinary stream or function. *Id.* at 11:22. Based on these facts, there can be no finding
 16 consistent with the *Hayes* analysis of chronic or substantial pain to establish the objective
 17 component since the only severe pain he had was with erections, and erections are avoidable. He
 18 never had unavoidable substantial or chronic pain as required by the *Hayes* court.

19 Likewise, the facts at issue in Plaintiff’s case also do not establish the subjective
 20 component required by the *Hayes* court. For the subjective component, the *Hayes* court held
 21 that it was met because a “jury could find that the relevant officials knew of the serious medical
 22 condition but intentionally or recklessly disregarded it.” *See Hayes*, 546 F.3d at 523. In *Hayes*,
 23 the treating physician Dr. Hamby was deposed and admitted that he did not refer the patient to
 24 the urologist and treat his pain despite recommendations from other providers because he did
 25 not have the proper paperwork, not because he used his medical judgment to determine it was
 26 not needed. *Id.* at 524. He also admitted that he refused to medicate inmate Hayes for pain,

1 despite there being a policy in place to do so, because “no pain experienced by any prisoner ever
 2 warrants prescription-strength painkillers.” *Id.* at 525. The Hayes court also concluded from
 3 Dr. Hamby’s deposition testimony that a jury could find that he was “hostile and dismissive to
 4 Hayes’ needs.” *Id.*

5 With Plaintiff in this case, the Court is aware and acknowledges that he was correctly
 6 diagnosed with Peyronie's disease at this first visit on July 31, 2014. *See R&R* at 4:5-6. The
 7 medical literature at the time indicated that “there was no definitive treatment or cure for this
 8 condition.” *Id.* at 5:13-14. Despite the literature available at the time, Plaintiff was prescribed
 9 Trental for 180 days, which was first on the list of drugs for this condition in the literature. *Id.*
 10 at 8:7-9.

11 Even taking the facts most favorable to Plaintiff under the objective analysis in *Hayes*,
 12 he was not suffering from chronic and substantial pain. Further, Plaintiff has failed to provide
 13 evidence to show: (1) that the treatment provided was inconsistent with the literature for this
 14 diagnosis, (2) that Trental was a “medically unacceptable” treatment under the circumstances,
 15 or (3) that failure to refer by itself is a constitutional violation.

16 Similarly, under the subjective analysis in *Hayes*, at no time has there been any factual
 17 assertions that the medical providers believed systemically that no prisoner should receive
 18 prescription-strength pain medication, that they were hostile towards plaintiff, or that they were
 19 dismissive to his complaints. Rather, the evidence is that the CRC used medical judgment based
 20 on the known diagnosis and the information available to conclude that a referral to a urologist
 21 was not required at that time. Therefore, *Hayes* should not be controlling as a basis to deny
 22 Defendants’ summary judgment motion based on qualified immunity.

23 **C. Contrary to Supreme Court and Ninth Circuit Law, the Magistrate Judge Erred in
 24 Relying on a Single Seventh Circuit Case to Deny Defendants Qualified Immunity**

25 The long standing rule for a plaintiff to defeat a defendant’s assertion of qualified
 26 immunity is that the plaintiff must succeed in showing both: (1) that the official violated a

1 statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the
 2 challenged conduct.’ ” *Wood v. Moss*, 134 S. Ct. 2056, 2066–67 (2014) (quoting *Ashcroft v. al-*
 3 *Kidd*, 563 U.S. 731, 735 (2011)); *Nelson v. City of Davis*, 685 F.3d 867, 875 (9th Cir. 2012).

4 Respectfully, Defendants object to the Magistrate Judge’s conclusion in the R&R that
 5 plaintiff met both prongs of this test. See Section A, *supra*, at p. 4-5 for Defendants’ discussion
 6 related to the first prong of the test. To establish the second prong, plaintiff must point to prior
 7 case law that articulates a constitutional right sufficiently clear that every reasonable official
 8 would have understood that what he is doing violates that right. *Ashcroft*, 563 U.S. at 741
 9 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Sharp v. Cty. of Orange*, 871 F.3d
 10 901, 911 (9th Cir. 2017). To achieve this level of notice, the prior precedent must be
 11 ‘controlling’ – from the Ninth Circuit or Supreme Court – or otherwise be embraced by a
 12 ‘consensus’ of courts outside the relevant jurisdiction. *Wilson v. Layne*, 526 U.S. 603, 617
 13 (1999); *Sharp*, 871 F.3d at 911.

14 The qualified immunity standard “gives ample room for mistaken judgments” by
 15 protecting “all but the plainly incompetent and those who knowingly violate the law.” *Hunter*
 16 *v. Bryant*, 502 U.S. 224, 229 (1991)(quoting *Malley v. Briggs*, 475 U.S. 335, 343 and 341
 17 (1986)). An official is entitled to qualified immunity unless existing case law “squarely
 18 governs” the case. *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015).

19 The United States Supreme Court has specifically and repeatedly admonished the Ninth
 20 Circuit for erroneously defining “clearly established law” at too high a level of generality. *City*
 21 *and Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct 1765, 1776, (2015); *Lopez v. Smith*,
 22 574 U.S. 1, 4 (2014); *Ashcroft*, 563 U.S. at 742. The Supreme Court has also repeatedly
 23 instructed that the lower courts must examine “whether the violative nature of *particular*
 24 conduct is clearly established” by controlling precedent. *Mullenix*, 136 S. Ct. 305, 308, (per
 25 curiam)(quoting *Ashcroft*, 563 U.S. at 742).

1 Here, the Magistrate Judge acknowledged that “there are no cases with precisely the same facts”
 2 in the Ninth Circuit at the time of the incidents alleged by plaintiff. *See R&R* at 23:6-8. Her
 3 honor then relied on a Seventh Circuit case, *Hayes v. Snyder*, 546 F.3d 516 (7th Cir. 2008)
 4 because she found it was “the closest case law existing at the time of the events in this case that
 5 should have put the defendants on notice – for purposes of qualified immunity – that their
 6 alleged conduct was unconstitutional.” *See R&R* at 23:5-15.

7 A single case from a different Circuit simply does not satisfy Supreme Court and Ninth
 8 Circuit Court’s requirement that out-of-circuit “controlling” precedent must be one that is
 9 embraced by a “consensus” of courts outside the relevant jurisdiction. *Sharp*, 871 F.3d at 911.
 10 There are no controlling cases from the Supreme Court, the Ninth Circuit or by out-of-circuit
 11 consensus that applies to the instant case. Consequently, Plaintiff cannot defeat Defendants’
 12 qualified immunity because he cannot meet the second prong of the test. On this basis,
 13 respectfully this Court must reject the Magistrate Judge’s recommendation and find that all of
 14 the defendants are entitled to qualified immunity from plaintiff’s lawsuit.

15 The Magistrate Judge identified two Ninth Circuit cases which her honor described as
 16 “clearly established Ninth Circuit precedent that a delay or denial of medical care due to
 17 inadequate treatment may constitute deliberate indifference under the Eighth Amendment.” *See*
 18 *R&R* at 29:21 - 30:8. Her honor recognized, however, that these cases were factually dissimilar
 19 from the instant case. *Id.* at 29:22. In the first case, *Ortiz v. City of Imperial*, 884 F.2d 1312,
 20 1313 (9th Cir. 1989), prison medical personnel ignored a prisoner’s head injury and instead
 21 treated him as though he had alcohol withdrawal symptoms, with the prison doctor prescribing
 22 sedatives over the phone that were inappropriate for his head injuries and without doing a
 23 physical examination. Plaintiff here was never in a medical emergency situation. He was being
 24 treated for the correct disease and did not suffer from emergent medical complications. *Ortiz*
 25 is not analogous and, respectfully, the Court should reject the Magistrate Judge’s
 26

1 recommendation that this case represents controlling law in plaintiff's situation on the issue of
 2 whether any defendant unconstitutionally delayed plaintiff's treatment.

3 Similarly, the second case cited in the R&R, *Tenore v. Goodgame*, No. 2:11-cv-1082
 4 WSB CKD P, 2014 WL 496697 (E.D. Cal 2014) is equally inapplicable to plaintiff's case. In
 5 *Tenore*, prison medical personnel may have misdiagnosed a prisoner's ailment multiple times
 6 and, as a result, prescribed wrong medication to him multiple times which was why the
 7 medication he received was ineffective. In contrast, Plaintiff here was diagnosed with the
 8 correct disease at his first medical visit on July 31, 2014, and does not allege that he was ever
 9 prescribed wrong medication. Respectfully, the Court should also reject the Magistrate Judge's
 10 recommendation that this case is controlling law on the issue of an unconstitutional delay in
 11 plaintiff's treatment.

12 The R&R additionally relies on *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982), *Ortiz*,
 13 *supra*, *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986) and *Snow v. McDaniel*, 681 F.3d
 14 978 (9th Cir. 2012) as controlling law giving notice to the defendants that they were required
 15 to refer plaintiff for an outside urology consultation because in-house prison medical staff was
 16 not competent to examine, diagnose and treat plaintiff's Peyronie's disease. See R&R at 30:9
 17 – 31:2. In *Hoptowit* and *Tousaint*, the Ninth Circuit Court addressed systematic failures in each
 18 States' prison system, including criticizing how the prison medical clinics were managed as a
 19 whole. Plaintiff has not alleged any mismanagement of the prison medical clinics he used nor
 20 alleged that any defendant was incompetent to examine, diagnose or treat him.

21 *Snow, supra*, the last case referenced in the R&R is also patently dissimilar to plaintiff's
 22 case. In *Snow*, prison medical doctors failed to authorize joint replacement surgery for a death
 23 row inmate whose hip disease had reached a point where he could barely walk and the NSAID
 24 pain medication the doctors prescribed were rapidly increasing his creatinine levels. Plaintiff
 25 here has not alleged any inability to perform his activities of daily living or submitted evidence
 26

1 showing that Trental was a medically unacceptable treatment under his circumstances.

2 Respectfully, the court should reject the Magistrate Judge's recommendations on this issue.

3 **D. In 2016, Midway Through the Relevant Period, the Ninth and Sixth Circuits Held
Defendants' Actions Were Constitutional and Merited Qualified Immunity**

4 The R&R alluded to the potential that if the facts are fully developed through discovery,
5 this case could be interpreted to fit the "obvious" category. See R&R at 23:9-10. Such a
6 conjecture is not a basis for denying qualified immunity and should be struck from the order.
7 Moreover, it is unlikely that this case will turn out to be that rare "obviously unconstitutional"
8 case because midway through the relevant time period of Plaintiff's claim, the Ninth Circuit
9 issued its ruling in *Hamby v. Hammond*, 821 F.3d 1085 (9th Cir. 2016)(filed May 2, 2016),
10 which held that qualified immunity applied in situations where prison medical providers chose
11 a more conservative, non-surgical approach to medical treatment and declined to refer the
12 prisoner for surgical evaluation despite knowing the prisoner was experiencing chronic pain.
13 *Hamby*, 821 F.3d at 1093. Around the same time, on June 6, 2016, the Sixth Circuit Court of
14 Appeals affirmed a decision granting qualified immunity in a situation virtually identical to the
15 instant case where the prisoner, who was diagnosed with Peyronie's disease and experienced
16 intermittent pain in his penis, received conservative medical treatment using the same drug,
17 pentoxifylline, and was not referred for evaluation. *Odom v. Corizon, Inc.*, No. 1:14-CV-606,
18 2015 WL 5749532 (W.D. Mich. Sept. 30, 2015), affirmed 6th Cir., # 15-2254, June 6, 2016.³
19 In other words, during the timeframe of this case, controlling law developed in the Ninth Circuit
20 and elsewhere upholding qualified immunity for prison medical providers in circumstances
21 similar to that faced by the Defendants here.

22

23

24

25 ³ The court can get an overview of Peyronie's disease by reviewing the referenced information attached in
26 *Odom v. Corizon, Inc.*, 2015 WL 5749532 (Signed Sept. 30, 2015) at fn. 1 (Peyronie's disease "is the development
of fibrous scar tissue inside the penis that causes curved, painful erections." See *Peyronie's Disease*, available at
<http://www.mayoclinic.org/diseases-conditions-disease/basics/definition-con-20028765>).

III. CONCLUSION

For the reasons stated above, Defendants respectfully request that this Court reverse the recommendations made by the Report and Recommendations and instead grant the Defendants' Motion for Summary Judgment based on qualified immunity.

DATED this 6th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2019, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and caused to be served a copy of this document on all parties or their counsel of record on the date below as follows:

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DATED this 6th day of June, 2019.

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